ARKANSAS SUPREME COURT

No. CR 95-1042

	Opinion Delivered **January 18, 2007**
D'ANGELO ALLEN Petitioner v. STATE OF ARKANSAS Respondent	*PRO SE* PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR *CORAM NOBIS* [CIRCUIT COURT OF CRITTENDEN COUNTY, CR 94-1023] PETITION DENIED.

PER CURIAM

In 1995, petitioner D'Angelo Allen was found guilty of capital murder and sentenced to life imprisonment without parole. We affirmed. *Allen v. State*, 324 Ark. 1, 918 S.W.2d 699 (1996). Subsequently, petitioner timely filed in the trial court a *pro se* petition pursuant to Criminal Procedure Rule 37.1 seeking to vacate the judgment. The petition was denied, and the order was affirmed. *Allen v. State*, CR 96-881 (Jan. 7, 1999) (*per curiam).*

Petitioner now asks that this court reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis.*[1] The petition for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error *coram nobis* after a judgment has been affirmed on appeal only after we grant permission *Dansby v. State*, 343 Ark. 635, 37 S.W.3d

[1]For clerical purposes, the instant petition to reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis* was assigned the same docket number as the direct appeal of the judgment.

599 (2001).

A writ of error *coram nobis* is an extraordinarily rare remedy, more known for its denial than its approval. *Larimore v. State*, 341 Ark.397, 17 S.W.3d 87 (2000). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999). These fundamental errors are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Pitts*, *supra, citing Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). *Coram nobis* proceedings are attended by a strong presumption that the judgment of conviction is valid. Newly discovered evidence in itself is not a basis for relief under *coram nobis*. *Larimore, supra*; *Smith v. State*, 301 Ark. 374, 784 S.W.2d 595 (1990). Finally, *coram nobis* proceedings require the petitioner to show that he proceeded with due diligence in making application for relief. *See Penn*, *supra*, *citing Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975). After reviewing the instant petition, we do not find that petitioner has stated good cause to grant leave to proceed with a petition for writ of error *coram nobis* in the trial court.

Petitioner contends that he is entitled to issuance of the writ on the ground that the State withheld material evidence from the defense. The evidence is alleged to consist of a custodial statement to police made by the State's "star witness," Tony McKenzie. McKenzie testified at petitioner's trial that he drove with petitioner, Earnest Phillips, and Quincy Wright to a location in West Memphis where Phillips asked McKenzie to let them out so that he could "sting a fool," or rob someone. McKenzie said that later that evening he saw petitioner, Phillips, and Wright and that

when he picked them up in his car, he noticed that petitioner was perspiring. He said that Phillips later admitted to him that he had killed a man. Another witness, Eric Marshall, testified that petitioner told him that the he and the other two men had gone to the victim's house where Phillips had shot the victim. Other witnesses testified that the house had been ransacked as though someone were looking for something. Petitioner gave a statement to police that was videotaped and shown to the jury in which he conceded that he was in the house but contended that he was not aware that Phillips would kill the victim when he went there. This court concluded that there was substantial evidence from which the jury could have found that petitioner aided, or attempted to aid, Phillips and Wright in the commission of capital murder and that he was more than an innocent bystander.

Petitioner now asserts that McKenzie agreed in exchange for not being charged as an accomplice to capital murder to say that Phillips made the "sting a fool" remark and that petitioner was sweating profusely when he picked the three men up in the vicinity of the victim's house after the crime had been committed. Petitioner has appended McKenzie's affidavit to his petition in which McKenzie avers that he agreed to incriminate petitioner in exchange for not being charged with being an accomplice, that Phillips did not say that he was going to "sting a fool" before he dropped the three men off, and that petitioner was not sweating when he saw him after the murder had been committed. Petitioner argues that without the statement, which suggested that he had known a robbery was planned by Phillips and that he was perspiring because he had participated in ransacking the house, there was a reasonable probability that the jury could have found that there was no advance plan to rob the victim and that Phillips shot the victim accidently.

The Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In *Strickler v. Greene*, 527 U.S. 263 (1999), the Court revisited *Brady* and declared that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 373 U.S. at 280, quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985). In *Stickler*, the court also set out the three elements of a true *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. We do not find that petitioner has met his burden of showing that there was a *Brady* violation in his case.

First, McKenzie in the affidavit states only that he lied in the statement he made. He does not contend that he made some other statement which the prosecution hid from the defense at trial. The defense was free to question McKenzie before trial and McKenzie was subject to cross-examination at trial where defense counsel was free to question him about the veracity of the statement and his motivation for making the statement. Secondly, petitioner admitted being at the house and witness Eric Marshall testified that petitioner told him that he, Phillips, and Wright had heard that the victim had won some money gambling and that they went to the victim's house and told him that they had car trouble as an apparent ruse to gain entry. Marshall further said that petitioner was shaky and tearful when he related the story. In short, there was other evidence implicating petitioner as an accomplice to the robbery and murder of the victim beyond that adduced from McKenzie. Under these circumstances, petitioner has not shown that the State withheld information that would have resulted in a different outcome in the proceedings.

Petition denied.